(53)

Supreme Court, U.S.
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No. 07-206

In the

Supreme Court of the United States

PATRICK GRANT DAVIS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari
to the U.S. Court of Appeals
for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In *United States v. Booker*, 543 U.S. 220 (2005), this Court held that the mandatory use of the Unites States Sentencing Guidelines violated one's Sixth Amendment right to a jury trial of any fact that could be used to enhance a criminal defendant's sentence. To remedy the violation, this Court made the Guidelines "effectively advisory" and one of many factors a district court is to consider when imposing a sentence under 18 U.S.C. § 3553(a). This Court also held that appellate courts are to review sentences for "reasonableness" in light of all of the factors enumerated under § 3553(a) and the reasons for the sentence as stated by the sentencing judge. The model of review on which *Booker* based its "reasonableness" standard paid "substantial deference" to a sentencing judge's discretion in departing from the guidelines range, as held in *Koon v. United States*, 518 U.S. 81, 98 (1996). Thus, the following issue is presented here:

> Whether an appellate court makes the United States Sentencing Guidelines effectively mandatory by failing to grant deference to the sentencing judge's decision in light of all the factors under 18 U.S.C. § 3553(a)and denying the substantial deference granted a district court's discretionary sentencing under the "reasonableness" standard chosen in *Booker*?

LIST OF PARTIES TO THE PROCEEDING BELOW

The petitioner, Patrick Davis, was initially represented by Richard A. Culler by appointment. Mr. Culler subsequently withdrew as Mr. Davis' counsel and Mr. Davis proceeded to trial *pro se*. He was then represented by Claire Rauscher of the Federal Public Defenders' Office for the Western District of North Carolina at sentencing. On appeal to the Fourth Circuit by the government, Mr. Davis was represented by Thomas K. Maher. Currently, he is represented by Noell P. Tin of Tin Fulton Greene & Owen, PLLC, 212 South Tryon Street, Suite 1700, Charlotte, North Carolina 28281. The United States is represented by United States Attorney David Gretchen Shappert, Western District of North Carolina, 227 West Trade Street, Suite 1650, Charlotte, North Carolina 28202.

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Petitioner, Patrick Grant Davis, respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fourth Circuit for this case rendered on May 16, 2007.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is found at 486 F.3d 822 (4th Cir. 2007). The opinion is reproduced in the Appendix to this writ, pp. A1-A17.

JURISDICTION

The order of the United States Court of Appeals for the Fourth Circuit vacating the petitioner's sentence and remanding for resentencing was entered on May 16, 2007. The question of whether the petitioner's sentence of probation was reasonable was presented to the Fourth Circuit by the United States and decided on the merits. This petition for certiorari is timely filed within ninety days of the Fourth Circuit's ruling. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The applicable constitutional provision is Amendment VI to the United States Constitution, which provides in pertinent part that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed ..." US. Const. Amend. VI.

The statutes involved are:

26 U.S.C. § 7203. Willful failure to file return, supply information, or pay tax

> Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return, keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $25,000 ($100,000 in the case of a corporation), or imprisoned not more than 1 year, or both, together with the costs of prosecution. In the case of any person with respect to whom there is a failure to pay any estimated tax, this section shall not apply to such person with respect to such failure if there is no addition to tax under section 6654 or 6655 with respect to such failure. In the case of a willful violation of any provision of section 6050I, the first sentence of this section shall be applied by substituting "felony" for "misdemeanor" and "5 years" for "1 year".

18 U.S.C. § 371. Conspiracy to commit offense or to defraud United States

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or

any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

18 U.S.C. § 3553. Imposition of a sentence

(a) Factors to be considered in imposing a sentence.-- The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider--

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed--

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for--

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines--

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement--

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States

Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

(b) Application of guidelines in imposing a sentence.--

(1) In general.--Except as provided in paragraph (2), the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

18 U.S.C. § 3742.

(e) Consideration.--Upon review of the record, the court of appeals shall determine whether the sentence--

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines;

(3) is outside the applicable guideline range, and

(A) the district court failed to provide the written statement of reasons required by section 3553(c);

(B) the sentence departs from the applicable guideline range based on a factor that--

(i) does not advance the objectives set forth in section 3553(a)(2); or

(ii) is not authorized under section 3553(b); or

(iii) is not justified by the facts of the case; or

(C) the sentence departs to an unreasonable degree from the applicable guidelines range, having regard for the factors to be considered in imposing a sentence, as set forth in section 3553(a) of this title and the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 3553(c); or

(4) was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable.

The court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous and, except with respect to determinations under subsection (3)(A) or (3)(B), shall give due deference to the district court's application of the guidelines to the facts. With respect to determinations under subsection (3)(A) or (3)(B), the court of appeals shall review de novo the district court's application of the guidelines to the facts.

STATEMENT OF THE CASE

On May 7, 2002, Mr. Davis was indicted on charges of willful failure to file tax returns in violation of 26 U.S.C. § 7203. Mr. Davis was then named in a superseding indictment in which he was charged with conspiring to defeat the lawful functions of the Internal Revenue Service in violation of 18 U.S.C. § 371 in addition to the aforementioned charges. Martin Louis Baucom was added to the superseding indictment as a co-defendant. .

Mr. Davis and Mr. Baucom proceeded to a joint jury trial on August 4, 2003, each appearing *pro se*. At the conclusion of the trial, the jury convicted both defendants on all counts.

Prior to sentencing, the guideline range recommended in Mr. Davis' Presentence Report was 21 to 27 months due to his base Offense Level of 16 and Criminal History Category of I.

Mr. Davis appeared for sentencing on February 23, 2006 during which his counsel (he had retained counsel at this point) pointed out his efforts to pay back the taxes

he had owed and the amount of charitable work he had done. Sentencing Tr. pp. 31-33.[1] The district court then made the following findings:

> The defendant is a man who has provided extraordinary charitable works. Again, that's not something I would consider under the Guidelines, but as the Court said in Booker and Fanfan, that I have to consider all of this stuff ... As to the nature of the need for the sentence to reflect the seriousness of the offense, to promote respect for the law, and provide just punishment for the offense, the government persuasively argues that a sentence of incarceration is necessary in order to do that. The defense equally persuasively argues that it is not. ... As to adequate deterrence to criminal conduct, either people are already afraid of the Internal Revenue Service or nothing I do in this case is going to deter other people. I think Mr. Davis is adequately deterred from any kind of criminal conduct. There's no need to protect the public from further crimes of this defendant. He's not likely to do that. In fact, he presents to the Court a rather extraordinary record of attempting to get his taxes right. ... He's-- as I said, no criminal record. He's a good husband and father. Gainfully employed. He employs others. If I incarcerated him others would lose their jobs. If I incarcerated him so that his business tanks, the Internal Revenue Service seems unlikely to get much of the monies that are owed. ... And there is no evidence on Factor 6 of unwarranted

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[1] See Transcript of Sentencing Hearing. (Appendix pp. A54-A55).

> sentencing disparities among defendant with similar records who have been found guilty of similar conduct.

Id. p. 40-41 (Appendix pp. A62-A63).

Mr. Davis was then sentenced to serve four years probation, including twelve months on house arrest with work release, among other conditions. *Id.* p 42. (Appendix pp. A-63-A64)

Mr. Davis and his co-defendant each filed a timely notice of appeal appealing their convictions on the ground that they were denied their Sixth Amendment right to counsel and forced to proceed *pro se* despite their efforts to retain counsel. The government cross-appealed, appealing their sentences. Specifically, as to Mr. Davis' sentence, the government contended that it was unreasonably low.

The Fourth Circuit Court of Appeals entered its opinion on May 16, 2007, in which it affirmed Mr. Davis' conviction, but vacated his sentence and remanded for resentencing on the ground that the sentence he received was unreasonably low. *United States v. Baucom*, 486 F.3d 822 (4th Cir. 2007). The appellate court noted that the "district court discounted the value of deterrence in so-called 'tax protestor' cases." *Id.* at 830. Additionally, the appellate court opined that the sentence "imposed by the district court fail[ed] to reflect the seriousness of the offense and [did] not provide just punishment, as required by 18 U.S.C.A. § 3553(a)(2)(A)." *Id.* Finally, the appellate court expressed concern over "the heavy reliance of the district court on Davis' charitable works." *Id.* at 831. The appellate court failed to address the district court's findings that there was no need to protect the public from any further crimes by Mr. Davis, that he was a good father and husband, that he was gainfully employed and employed others, that he had no criminal

record, and that no evidence was presented to suggest any great disparities between Mr. Davis and those with similar records who were found guilty of similar conduct. Furthermore, the Court of Appeals did not take into consideration the district court's judgment that Mr. Davis' incarceration would have serious negative effects on others and would prevent the Internal Revenue Service from receiving money owed.

REASONS WHY THE WRIT SHOULD ISSUE

I. The Court should decide whether an appellate court's failure to grant deference to the sentencing judge's decision in light of all the factors under 18 U.S.C. § 3553(a) when assessing the reasonableness of a non-guidelines sentence negates *Booker*'s constitutional remedy and produces a *de facto* binding guidelines regime.

In *Unites States v. Booker*, 543 U.S. 220 (2005), Justice Scalia posed the following question: "Will appellate review for 'unreasonableness' preserve *de facto* mandatory guidelines by discouraging district courts from sentencing outside the Guidelines range?... Time may tell...." *Booker*, 543 U.S. 220, 313 (2005) (Scalia, J., dissenting in part).

The reasonableness review developed in the Fourth Circuit answers Justice Scalia's cautionary inquiry with a clear "yes." The Circuit reviews non-Guidelines sentences from a premise that the Guidelines established the reasonable range of sentencing. *Untied States v. Moreland*, 437 F.3d 424, 433 (4th Cir. 2006) ("A sentence that falls within the properly calculated advisory guidelines range is entitled to a rebuttable presumption of reasonableness.") The Fourth Circuit then measures reasonableness by examining, "whether the district court acted reasonably with respect to (1) the imposition of a variance sentence, and (2) the extent of the variance."

Moreland, 437 F.3d at 434. Finally, the Fourth Circuit determines how compelling the district court's reasons were as to the extent of the variance. *See Id.* at 434 ("The farther the court diverges from the advisory guideline range, the more compelling the reasons for the divergence must be.") This approach shifts the appellate focus from assessing the reasonableness of the district court's stated reasons for the sentence against all the factors enumerated under 18 U.S.C. § 3553(a) to the limited question of whether the judge reasonably chose to depart from the guidelines range and whether the extent of that guidelines variance was reasonable. The Fourth Circuit's version of "reasonableness" review revives 18 U.S.C. § 3553(b), which "required sentencing courts to impose a sentence within the applicable Guidelines range (in the absence of circumstances that justify a departure)." *See Booker*, 543 U.S. at 259. Further, the Fourth Circuit's approach to assessing reasonableness replaces the substantial deference historically granted to a sentencing judge's discretion in resolving the myriad considerations involved in choosing a sentence. *See Koon v. United States*, 518 U.S. 81, 97-99 (1996). That deference played an established role in the pre-2003 appellate review of sentences imposed outside the applicable guidelines range on which this Court modeled the reasonableness review ordered in *Booker*, 543 U.S. at 261 and *Koon*, 518 U.S. at 98.

The Fourth Circuit's guidelines-focused style of reasonableness review conflicts with the appellate review mandated by *Booker* and *Koon*. The Eleventh Circuit, for instance, does not employ such an approach to reviewing the reasonableness of sentences. This conflict in appellate review invites disparate sentences. *Compare Baucom* and *United States v. Williams*, 435 F.3d 1350, 1355 (11th Cir. 2006) (affirming reasonableness of sentence fifty per cent below guidelines range for selling crack cocaine chosen in light of defendant's age, minimal criminal record, and

medical condition). Certiorari is warranted to prevent the inevitable sentencing disparities caused by the different circuit approaches to sentencing review.

A. The *Booker* remedy required "effectively advisory" guidelines, not presumptive guidelines sentencing

The United States Sentencing Guidelines, as they were implemented prior to the decision in *Booker*, violated the Sixth Amendment right to a jury trial because they required judges rather than juries to find facts that led to enhanced sentences. *See Booker*, 543 U.S. at 245. The constitutional problem arose because judges were essentially bound to impose the guidelines range almost all the time. *See id.* at 259. Section 3553(b) made the guidelines "binding" on the judges because it "required sentencing courts to impose a sentence within the applicable Guidelines range (in absence of circumstances that justify a departure)," *Id.* at 259. The fact that the statute allowed judges to impose sentences outside the guidelines range did not render the guidelines advisory, because such departures were not available in every case, "and in fact [were] unavailable in most." *Id.* at 234. In effect, the Sentencing Reform Act that led to the creation of the Guidelines, 18 U.S.C. § 3591 *et seq* (SRA), made the Guidelines the "presumptive" sentencing range that bound judges' sentencing decisions most – but not all – of the time. *Id.*

This Court chose a constitutional remedy intended to render the sentencing guidelines "effectively advisory." *Id.*. at 245. The Court sought to achieve this result by (1) eliminating the statutory provision in § 3553(b) that required district courts to impose guidelines sentences "in the absence of circumstances that warranted a departure," and (2) by eliminating the appellate review provisions intended to enforce guidelines sentencing (section 3742(e)). *Id.* at 259, 261. In excising section 3553(b), the Court directed that sentencing judges make

individual sentencing decisions grounded in all the facts set forth in 18 U.S.C. § 3553(a). *See id.* at 245. Sentencing judges must still consider the guidelines range as one such factor, but the constitutional remedy required that judges be free to impose non-guidelines sentences grounded in the other 3553(a) considerations. *Id.* Those factors included "the nature and circumstances of the offense and the history and characteristics of the defendant," the need to "reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment," to "protect the public," to provide the defendant with training, care, "or other correctional treatment in the most effective manner," and the need to avoid unwarranted sentence disparities. 18 U.S.C. §§ 3553(a)(1), 3553(a)(2)(A)-(D), 3553(a)(6).

In excising the appellate review provisions of sections 3742(e) the Court recognized a surviving right to appellate review of sentences to determine whether they are "unreasonable." *Booker*, 543 U.S. at 261. The Court modeled such review on the reasonableness review previously applied to non-guidelines sentencing according to the pre-2003 version of Section 3742(e). *Id.* Under this standard, appellate courts assess the district court's sentence

> with a view toward determining whether such a sentence '*is unreasonable*, having regard for... the factors to be considered in imposing a sentence, as set forth in [§ 3553(a)], and... the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 3553(c).'

Id. (*quoting* 18 U.S.C. § 3742(e)(3) (1994 ed.) emphasis added in *Booker*).

A significant feature of the new "reasonableness" review "is that it requires courts of appeals to evaluate each sentence *individually* for reasonableness, rather than apply the cookie-cutter standards of the Guidelines (within the correct Guidelines range, affirm; outside the range without adequate explanation, vacate and remand.)" *Booker*, 543 U.S. at 312 (Scalia, J., dissenting) (emphasis in original).

The Fourth Circuit's guidelines-focused style of review applies the "cookie-cutter" style of appellate review that *Booker* struck down. *Booker* instructed appellate courts to assess criminal sentences against the full range of sentencing factors listed in §3553(a). *Id.* at 261. The Fourth Circuit, instead, reviews both non-guidelines sentences and guidelines sentences alike from a starting presumption that the Guidelines establish the range of reasonable sentencing. *Moreland*, 437 F.3d at 433.

The shift in appellate focus from the reasonableness of a district court's chosen sentence in light of all the section 3553(a) factors to the reasonableness of not using the guidelines range and the reasonableness of the degree of guidelines variance, elevates the Guidelines calculation in section 3553(a)(4)(i) above all other section 3553(a) considerations without any justification in the language or reasoning of *Booker*.

B. The Fourth Circuit's approach to reviewing sentences neglects the substantial deference granted a sentencing judge's discretion, and effectively applies the *de novo* style of review struck down in *Booker*.

As previously noted, the *Booker* remedy required the excision of the 2004 version of § 3742(e), particularly its requirement of *de novo* review of Guidelines departures "to make the Guidelines even more mandatory than they had been." *Booker*, 543 U.S. at 261. In its place the Court

prescribed a standard of appellate review like the one used to review sentences imposed outside the applicable guidelines for "unreasonableness" prior to 2003. *Booker*, 543 U.S. at 261, *citing* § 2742(e)(3) (1994 ed.). Under such review, the district court's decision to depart from the guidelines was entitled in most cases to "substantial deference, for it embodie[d] the traditional exercise of discretion by a sentencing court." *Koon*, 518 U.S. at 98.

The considerations favoring a deferential "abuse of discretion" standard have even greater force now, given the expanded discretion and considerations sentencing judges must consider under the advisory system *Booker* created. Unshackled from the Guidelines' prior exclusion of judicial consideration for a defendant's personal background and rehabilitative needs, judges now face a far broader range of sentencing considerations. *Booker*, 543 U.S. at 245-46.

The Fourth Circuit, however, awards deference to the guidelines range, not the reasons for the sentence, "as stated by the district court." *Booker*, 543 U.S. at 261. In Davis's case, the sentencing judge listed multiple factors in its decision for downward departure. These factors included (1) Davis's acceptance of responsibility; (2) his effort to become current on his taxes; (3) his lack of criminal record; (4) his considerable charity work; (4) the absence of need to deter Davis from further criminal conduct or to protect the public; (5) the support he provides his family; (6) his gainful employment; and (7) the effect on Davis's numerous employees if he were incarcerated. Sentencing Tr. pp. 40-41. (Appendix pp. A62-A63) In systematically rejecting each of these rationales, the court of appeals failed to give the level of deference historically given to the district court's sentence. *See Koon*, 518 U.S. 81, 97-99 (1996) (*Citing Mistretta*, 488 U.S., at 367, 109 S. Ct., at 652) ("A district court's decision to depart from the Guidelines, by

contrast, will in most cases be due substantial deference, for it embodies the traditional exercise of discretion by a sentencing court.").

The Fourth Circuit's approach to reviewing sentences results in a *de novo*-style of review, as Davis's case demonstrates. The appellate court had no opportunity to observe—much less question—Davis at sentencing or any other proceeding. It gave little, if any, consideration to the sentencing judge's personal assessment of the defendant or the various other factors that made downward departure appropriate in this case.

C. The Circuit conflict regarding "reasonableness" review promotes disparity in sentencing.

The split among circuits over the amount of deference to be paid to the district court's assessments when reviewing post-*Booker* sentences promotes disparate sentencing results. Here, the Fourth Circuit expressed disapproval of the sentencing judge's determination that a sentence of probation would sufficiently address the deterrence factor. *Baucom*, 486 F.3d at 830. Then, without addressing most of the district court's findings, the Fourth Circuit opined that Mr. Davis' sentence "fail[ed] to reflect the serious of the offense and [did] not provide just punishment, as required by 18 U.S.C.A. § 3553(a)(2)(A). *Id.* Finally, the Fourth Circuit expressed its troubles over the district court's consideration of Mr. Davis' charitable works in imposing his sentence. *Id.* at 830-31.

In the Eleventh Circuit, the appellate court affirmed a similarly large variance from the guidelines for selling crack cocaine based on a defendant's age, minimal criminal record, and his health. *United States v. Williams*, 435 F.3d 1350, 1354-55 (11th Cir. 2006). The Eleventh Circuit measured the reasonableness of the sentence by focusing on the propriety of the sentencing

considerations stated by the judge. *Id.* The district court in the Eleventh Circuit did not have to justify its "failure" to apply a guidelines sentence—much less provide justification proportional to the extent of the percentage variation from the guidelines range. The Eleventh Circuit would have clearly upheld Mr. Davis' sentence.

This Court's remedial majority in *Booker* affirmatively admonished that the reasonableness review it prescribed would not provide the type of sentencing "uniformity" Congress originally sought to secure in sentencing. *Booker*, 543 U.S. at 263. However, this Court did not condone disparate sentences generated by the use of conflicting standards of reasonableness review amongst the circuits.

D. This petition for a writ of certiorari in this case should be held pending the Court's decision in *Gall v. United States* (06-7949).

By granting certiorari in *United States v. Gall*, 446 F.3d 884 (8th Cir. 2006), this Court has acknowledged that the appropriate level of scrutiny that courts of appeal should apply when determining the "reasonableness" of sentences imposed by district courts requires review and clarification. Additionally, this Court has recognized the importance of clarifying whether it is appropriate after *Booker* for district courts to be required to make extraordinary justifications when they elect to depart downward from the Guidelines.

Gall is a suitable vehicle for this Court to resolve, in the wake of *Booker*, the issue set forth herein. As such, the petition for a writ of certiorari in this case should be held pending the Court's decision in *Gall* and then disposed of in light of that decision. However, should the Court determine that plenary review is appropriate in this case as well as *Gall*, the matters should be consolidated for oral argument.

CONCLUSION

For the reasons stated herein, this Honorable Court should grant the Petitioner's Petition for Grant of Certiorari.

This the 14th day of August, 2007.

Respectfully submitted,

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PUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v. No. 06-4229

MARTIN LOUIS BAUCOM,
Defendant-Appellant.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v. No. 06-4230

PATRICK GRANT DAVIS,
Defendant-Appellant.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v. No. 06-4273

MARTIN LOUIS BAUCOM,
Defendant-Appellant.

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v. No. 06-4396

MARTIN LOUIS BAUCOM,
Defendant-Appellee.

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v. No. 06-4398

PATRICK GRANT DAVIS,
Defendant-Appellee.

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v. No. 06-4418

MARTIN LOUIS BAUCOM,
Defendant-Appellee.

Appeals from the United States District Court
for the Western District of North Carolina,
at Charlotte and Statesville.
Graham C. Mullen, Senior District Judge.
(5:02-cr-00026-1; 5:02-cr-00026-2; 3:02-cr-00147)

Argued: March 16, 2007
Decided: May 16, 2007
Entered: May 16,2007

Before WILKINS, Chief Judge, and WILKINSON and TRAXLER, Circuit Judges.

Affirmed in part; vacated and remanded in part by published opinion. Chief Judge Wilkins wrote the opinion, in which Judge Wilkinson and Judge Traxler joined.

COUNSEL

ARGUED: Thomas Kieran Maher, Chapel Hill, North Carolina, for Martin Louis Baucom and Patrick Grant Davis. David Alan Brown, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Charlotte, North Carolina, for the United States. ON BRIEF: Gretchen C. F. Shappert, United States Attorney, Charlotte, North Carolina, for the United States.

OPINION

WILKINS, Chief Judge:

Martin Louis Baucom and Patrick Grant Davis (collectively, "Appellants") appeal their convictions for conspiracy to defraud the United States, *see* 18 U.S.C.A. § 371 (West 2000), and willful failure to file tax returns, *see* 26 U.S.C.A. § 7203 (West 2002). The Government challenges the variance sentences imposed by the district court, contending that the district court improperly calculated the advisory guidelines range and that the sentences imposed were unreasonable. For the reasons set forth below, we affirm Appellants' convictions, vacate their sentences, and remand for resentencing.

I.

Appellants operated Baucom-Davis and Associates, a land surveying and computer consulting business. From 1990 until 2002, Appellants failed to file personal income tax returns. They also failed to file income and employment tax returns for the business.

Appellants were charged in separate indictments on May 7, 2002. On June 3, before his initial appearance, Davis requested a 60-day continuance "to seek competent assistance of counsel to represent [him] on constitutional grounds." J.A. 39. Davis' motion stated that he had "NEVER Waived [his] RIGHT TO COUNSEL" and that

he "object[ed] to this court's attempt to force counsel on [him] against [his] will." *Id.* at 41. Magistrate Judge H. Brent McKnight granted Davis' request for additional time.

At his initial appearance on June 17, Baucom also requested additional time to obtain counsel. This request was granted by Magistrate Judge Carl Horn, III. Telephone calls from the office of the clerk on July 2 and 18 indicated that Baucom had not yet obtained counsel. At a hearing on August 12, Baucom informed the court that he had sent nine questionnaires to attorneys in the hope of obtaining counsel but had been unsuccessful. Magistrate Judge Horn granted Baucom an additional four weeks, advising him that he should consider another method of contacting potential attorneys and warning him that he would be required to appear pro se at his arraignment if he did not obtain counsel.

Meanwhile, on July 9, Davis filed another request for a continuance to seek counsel. Davis asserted the right to have a "friend" act as counsel, arguing that the right to "Counsel" guaranteed by the Sixth Amendment, U.S. Const. amend. VI, was not limited to professional attorneys. Davis' 28-page memorandum in support of his motion provided, in part:

> Defendant . . . has little confidence in the legal profession . . . . Defendant is aware of a few attorneys he trusts, but their multi-thousand dollar fees are out of the question . . . . He does NOT trust just any attorney out of a grab-bag whom the government is willing to furnish; neither would this defendant be satisfied with such an "attorney's" concept of the Constitution of the United States after the average attorney, full of law-school brainwashing, thinks that the Constitution is what the

> judges say it is, rather than what the Constitution itself, says it is.

J.A. 75. At a hearing regarding the motion, Magistrate Judge McKnight offered to appoint counsel for Davis, but Davis declined. The judge granted Davis an additional 60 days.

At a hearing on August 8, Davis informed the judge that he still had not obtained counsel. Davis assured Magistrate Judge McKnight that he did not plan to ask for another extension of time. Despite this pledge, on September 3 Davis filed yet another request for a 60-day continuance to obtain counsel. The motion indicated that Davis had contacted only three attorneys since the previous hearing. Baucom filed an identical motion on the same day, naming the same three attorneys and providing copies of the same certified mail receipts that Davis had used as proof that he was attempting to obtain counsel.

Magistrate Judge Horn conducted Baucom's arraignment on September 9, at which time Baucom stated that he still did not have counsel. Magistrate Judge Horn justifiably admonished Baucom for continuing to send questionnaires to potential attorneys after having been advised that this was not an effective means of obtaining counsel. The judge then ruled that Baucom had had adequate time to obtain counsel, deemed him to be representing himself for purposes of the arraignment, and asked Baucom whether he pleaded guilty or not guilty. When Baucom refused to enter a plea, Magistrate Judge Horn entered a plea of not guilty on Baucom's behalf.

On October 23, Davis filed a document entitled "AFFIDAVIT & DECLARATION OF CONTINUED EFFORTS TO SEEK COMPETENT COUNSEL." *Id.* at 156. The document contained numerous citations of

Washington State cases and procedural rules. Among other things, Davis asserted that "[t]his court has NO authority to appoint me counsel over my objections"; "I can and will sue any Attorney for ineffective assistance of counsel who is appointed to my case over my objections"; and that "I can and will sue the person who picked my attorney and appointed him to me over my objections if said attorney loses my case." *Id.* at 163. The "affidavit" was witnessed by Davis' wife (who also notarized it) and by Baucom.

On November 4, United States District Judge Richard L. Voorhees entered an order denying Davis additional time to seek counsel. Judge Voorhees concluded that Davis "has been given ample time to secure counsel, and his failure to do so is a result of his unjustifiable failure to avail himself of the opportunities fairly given." *Id.* at 183.

At a hearing regarding counsel on November 6, Davis stated,

> I'm of the opinion that this indictment is invalid and I don't think that I should have to plead to an invalid indictment. It fails to state the specific tax that they are alleging I have never paid. . . . [T]he section that is listed on this indictment is a section that specifies the penalty for failing to obey some other section, but they did not specify the section that I have supposedly failed to comply with.

Id. at 191-92. Davis further asserted that even to plead "not guilty" would amount to accepting the validity of the Government's claim that there was a tax that Davis owed. Judge Voorhees rejected this argument, noted that Davis had had adequate time to obtain counsel, and stated that Davis had the option of proceeding pro se with or without standby counsel or having counsel appointed.

Responding to Davis' protest, Judge Voorhees observed that Davis "seem[ed] to take an attitude that [he was] not going to do anything affirmatively that might help address the stalemate that now exists in the case and consequently the court has to take its own initiative in the matter." *Id.* At 196. The court therefore appointed counsel.

A superseding indictment was filed on December 3, essentially consolidating the charges against Appellants. Several days later, Davis filed yet another motion seeking an extension of time to seek counsel. He also filed several documents purporting to terminate appointed counsel. At Davis' arraignment on December 12, Magistrate Judge Horn discussed the situation with Davis and with appointed counsel and decided to leave matters as they stood. When Davis refused to enter a plea, Magistrate Judge Horn entered a plea of "not guilty" on Davis' behalf.

Davis filed a fifth request for a continuance on December 30, 2002. Baucom filed an identical request—his third—on the same day. At Baucom's rearraignment, also on December 30, Magistrate Judge Horn warned Baucom that the onus was on him to obtain a lawyer, and if the scheduled trial date arrived and Baucom did not have counsel, he would be required to proceed pro se. Baucom acknowledged this. Magistrate Judge Horn conducted a status-of-counsel hearing regarding Davis on March 6, 2003. In light of Davis' refusal to cooperate with appointed counsel, Magistrate Judge Horn relieved appointed counsel. The judge then warned Davis that his trial was scheduled for early April and stated, "You do not have a right to delay the trial any further. That will be up to the [district court] whether [it] wants to exercise the discretion and give you more time or not. If you get to the April term and you haven't found someone to represent you, you will be representing yourself . . . ." *Id.* at 283.

Despite the warnings given to both Appellants, neither had retained counsel by the April term of court. United States District Judge Graham Mullen (hereinafter "the district court") continued the case to the July term of court.

On April 10, the district court filed a document from one Lewis Anthony Ewing, which the court construed as a motion to appear pro hac vice. The motion included a declaration in which Ewing claimed to be "admitted to practice in the Superior Courts of the State of Washington" and five tribal courts in that state, and "a member in good standing" of several bar associations. *Id.* at 302. Ewing's declaration identified "Alan Richey" as co-counsel but provided no information regarding him. *Id.* The motion was referred to Magistrate Judge Horn. In a written order, the judge noted that despite Ewing's purported membership in bar *associations*, the declaration did not indicate whether Ewing had graduated from an accredited law school, whether he had passed a state bar exam, and whether he had been admitted to any state bar. Further, Magistrate Judge Horn's order stated that he had called the telephone number supplied in the declaration to inquire about these matters. "Mr. Ewing's message did not appear to be that of a law office, but the undersigned identified himself and recorded the three points of inquiry on Mr. Ewing's voice mail." *Id.* at 309. This call was not returned. In light of these problems, Magistrate Judge Horn denied the motion.

Appellants' case was called for trial on August 4, 2003. At that time, Appellants still were not represented by counsel, and they requested another continuance. The district court denied the motion, commenting, "It sure looks like you fellows have gamed the system and it's time for it to be over with . . . ." *Id.* at 344. The case then proceeded to trial, and Appellants were convicted.

II.

We first consider Appellants' challenge to their convictions. Appellants maintain that their Sixth Amendment right to counsel was violated by the refusal of the district court to grant a further continuance to allow them to obtain counsel. We disagree. The Constitution generally entitles a defendant to representation by counsel of his choice. *See United States v. Gonzalez-Lopez*, 126 S. Ct. 2557, 2561 (2006). This right may be violated when the district court refuses to continue a trial despite the fact that the defendant does not have counsel, or when defendant's counsel is unprepared to proceed. *See Sampley v. Att'y Gen.*, 786 F.2d 610, 612-13 (4th Cir. 1986). At the same time, however, a defendant cannot delay trial indefinitely "by simply showing up without counsel, or with allegedly unsatisfactory counsel, whenever his case is called for trial." *Id.* at 613. In considering a request for continuance on the basis of absence of counsel, the court must "make a judgment whether [the lack of counsel] results from the lack of a fair opportunity to secure counsel or rather from the defendant's unjustifiable failure to avail himself of an opportunity fairly given." *Id.* This judgment is reviewed for abuse of discretion. *See id.*

The district court clearly did not abuse its discretion here. Nearly 15 months elapsed between Appellants' initial indictments and the date their case was called for trial. The record reveals that this lengthy delay was due entirely to the desire of the magistrate and district court judges to provide Appellants ample opportunity to obtain counsel of their choice. Under the circumstances, Appellants were given a fair opportunity to obtain counsel, and the denial of their motion to continue on the day of trial was not an abuse of discretion.

III.

Having affirmed Appellants' convictions, we now consider the Government's challenges to the sentences imposed by the district court. In *United States v. Booker*, 543 U.S. 220, 244 (2005), the Supreme Court held that the Sixth Amendment right to a jury trial is violated when the district court, acting pursuant to a mandatory guidelines system, imposes a sentence greater than the maximum authorized by the facts found by the jury alone. To remedy this problem, the Court severed and excised the provisions of the Sentencing Reform Act, *see* Sentencing Reform Act of 1984, Pub. L. No. 98-473, ch. II, 98 Stat. 1987-2040 (1984) (codified as amended at 18 U.S.C.A. §§ 3551-3742 (West 2000 & Supp. 2006) and at 28 U.S.C.A. §§ 991-998 (West 2006)), that mandated sentencing and appellate review in conformance with the guidelines. *See Booker*, 543 U.S. at 259. This excision rendered the guidelines "effectively advisory," *id.* at 245, and replaced the previous standard of review with review for reasonableness, *see id.* at 261.

We have previously described the necessary procedure for imposing sentence under the now-advisory sentencing guidelines:

> First, the court must correctly determine, after making appropriate findings of fact, the applicable guideline range. Next, the court must determine whether a sentence within that range serves the factors set forth in [18 U.S.C.A.] § 3553(a) [(West 2000 & Supp. 2006)] and, if not, select a sentence within statutory limits that does serve those factors. In doing so, the district court should first look to whether a departure is appropriate based on the Guidelines Manual or relevant case law. . . . If an appropriate basis for departure exists, the district court may depart. If the resulting departure range still does not serve the

> factors set forth in § 3553(a), the court may then elect to impose a nonguideline sentence (a "variance sentence"). The district court must articulate the reasons for the sentence imposed, particularly explaining any departure or variance from the guideline range. The explanation of a variance sentence must be tied to the factors set forth in § 3553(a) and must be accompanied by findings of fact as necessary. The district court need not discuss each factor set forth in § 3553(a) in checklist fashion; it is enough to calculate the range accurately and explain why (if the sentence lies outside it) this defendant deserves more or less.

United States v. Moreland, 437 F.3d 424, 432 (4th Cir.) (citations, internal quotation marks, & alterations omitted), *cert. denied*, 126 S. Ct. 2054 (2006). We review a sentence for reasonableness, considering "the extent to which the sentence . . . comports with the various, and sometimes competing, goals of § 3553(a)." *Id.* at 433.

We begin our analysis by recounting the manner in which the district court calculated Appellants' advisory guideline ranges. Baucom's presentence report (PSR) estimated his unpaid taxes at$347,134.40; this amount included approximately $36,000 in unpaid state taxes. *See United States Sentencing Guidelines Manual* § 2T4.1(G) (2003) (providing a base offense level of 18 for tax loss of more than $200,000 but less than $400,000). The PSR recommended a downward adjustment of two levels for acceptance of responsibility, *see* U.S.S.G. § 3E1.1(a). The resulting final offense level of 16, combined with Baucom's Criminal History Category of I, resulted in an advisory guideline range of 21-27 months. Davis' guideline range was calculated in the same manner,

except that Davis' PSR estimated his unpaid taxes to be approximately $20,000 more than Baucom's.

At Baucom's sentencing hearing in November 2004, the district court refused to include the state taxes in relevant conduct:

> I don't think I have the . . . jurisdiction to sentence this man for [a] violation of North Carolina law. I mean, it's inconceivable to me that a federal judge would be sitting up here and saying you violated North Carolina law and I'm putting you in jail for it. It's just — what happened to the whole notion of federalism? I don't think I have the power to do that. And if I do, if I have discretion, I decline to exercise the discretion to do that. It's not fair and I ain't gonna. Y'all can all go to Richmond and they can tell some other judge what to do.

J.A. 702-03. The district court also overruled the Government's objection to the acceptance of responsibility reduction. The court found that Appellants had gone to trial solely for the purpose of challenging the constitutionality of the federal tax system and therefore the acceptance of responsibility reduction was available to them even though they had gone to trial. *See* U.S.S.G. § 3E1.1, comment. (n.2) (noting that a defendant who goes to trial may still receive an acceptance of responsibility deduction when, for example, he "goes to trial to assert and preserve issues that do not relate to factual guilt," such as a constitutional challenge to the statutory scheme).

The district court announced a sentence for Baucom of 21 months imprisonment but delayed entering a judgment until Davis' sentence had been imposed. In the interim, the Supreme Court decided *Booker*, and the

district court reconvened the sentencing hearing in February 2006. The court considered the factors set forth in 18 U.S.C.A. § 3553(a), and imposed a sentence of 15 months imprisonment. The court found that after being a "scofflaw" for 12 years, J.A. 778, Baucom had not made adequate efforts to rectify the situation. However, the court ruled that there was no need to deter Baucom from furthercriminal conduct or to protect the public.

At Davis' sentencing, conducted the same day, the court imposed a sentence of four years probation, conditioned on the service of 12 months of house arrest. In articulating the reasons for this sentence, the court first noted Davis' "extraordinary charitable works," *id.* At 761, which consisted of his involvement with a group that each summer brought children living in the area of the Chernobyl nuclear disaster to the United States for medical treatment. The court also noted Davis' efforts to become current on his tax liability and the fact that if Davis were incarcerated, the employees of his business would suffer. As it did in Baucom's case, the court found little need for the sentence imposed to deter future criminal conduct or to protect the public.

A.

The Government first maintains that the district court erred by excluding state tax amounts from Appellants' relevant conduct. This is a question involving the legal interpretation of the guidelines, and as such it is subject to de novo review. *See United States v. Schaal*, 340 F.3d 196, 198 (4th Cir. 2003).

The question here is whether state tax loss is relevant conduct to a federal tax offense; if so, the district court erred in not including the state tax amounts in its guideline calculations. *See United States v. Hayes*, 322 F.3d 792, 802 (4th Cir. 2003) (holding that "a court has no discretion to disregard relevant conduct in order to

achieve the sentence it considers appropriate"). Relevant conduct includes "all acts and omissions . . . that were part of the same course of conduct or common scheme or plan as the offense of conviction." U.S.S.G. § 1B1.3(a)(2). Under the plain language of the guideline, state tax losses caused by Appellants are relevant conduct to the extent that they "were part of the same course of conduct or common scheme or plan" as Appellants' failure to file federal tax returns. *See United States v. Powell*, 124 F.3d 655, 665-66 (5th Cir. 1997).

The record indicates that Appellants failed to file state tax returns as part of the course of conduct for which they were convicted. Therefore, it was error for the district court to refuse to include the state tax amounts when calculating the advisory guideline range. Although Appellants contend that inclusion of the state tax loss would not alter their base offense levels, it is not clear that this is correct. The Government notes that the district court did not include in its calculations tax losses from the years 1998 through 2002, nor did it consider updated figures offered by the Government at Davis' sentencing hearing. We leave to the district court the task of calculating the correct amount of tax loss upon resentencing.

B.

The Government also contends that the district court erred in granting Appellants a two-level reduction for acceptance of responsibility. We review this ruling for clear error. *See United States v. Kise*, 369 F.3d 766, 771 (4th Cir. 2004). "A finding is clearly erroneous when, although there is evidence to support it, on the entire evidence the reviewing court is left with the definite and firm conviction that a mistake has been committed." *Faulconer v. Comm'r*, 748 F.2d 890, 895 (4th Cir. 1984).

Ordinarily, a reduction for acceptance of responsibility is not available to "a defendant who puts the government to its burden of proof at trial by denying the essential factual elements of guilt, is convicted, and only then admits guilt and expresses remorse." U.S.S.G. § 3E1.1, comment. (n.2). However, when the defendant does not contest factual guilt but goes to trial only for the sake of raising and preserving a constitutional challenge to the statutory scheme he is charged with violating, an acceptance of responsibility reduction may still be available. *See id.* "In each such instance, however, a determination that a defendant has accepted responsibility will be based primarily upon pre-trial statements and conduct." *Id.*

Seizing on the above-quoted sentence, the Government maintains that Appellants' pretrial conduct was uniformly obstructive and was "exactly the opposite of the expression of remorse that the acceptance of responsibility guideline contemplates." Br. for the United States at 36 (internal quotation marks omitted). We agree. Furthermore, we conclude that the district court clearly erred in finding that Appellants proceeded to trial solely for the purpose of preserving their constitutional challenge to the validity of the tax code. A cursory review of the trial transcript demonstrates that Appellants in fact challenged their factual guilt by contesting the element of willfulness. Therefore, the district court improperly granted Appellants reductions for acceptance of responsibility.

C.

Finally, the Government contends that the sentences ultimately imposed by the district court were unreasonable, even if premised on proper guidelines calculations. Although we have already determined that the district court improperly calculated the advisory guideline ranges for Appellants, we will provide some

brief comments regarding the reasonableness of Appellants' sentences as an aid to the district court on remand.

First, we note that in both of Appellants' cases, the district court discounted the value of deterrence in so-called "tax protestor" cases. The Government argues that this ruling is inconsistent with the policies set forth in the guidelines, and we are inclined to agree. In commentary preceding the tax guidelines, the Sentencing Commission states:

> The criminal tax laws are designed to protect the public interest in preserving the integrity of the nation's tax system. Criminal tax prosecutions serve to punish the violator and promote respect for the tax laws. *Because of the limited number of criminal tax prosecutions relative to the estimated incidence of such violations, deterring others from violating the tax laws is a primary consideration underlying these guidelines.* Recognition that the sentence for a criminal tax case will be commensurate with the gravity of the offense should act as a deterrent to would-be violators.

U.S.S.G. Ch. 2, Pt. T, intro. comment. (emphasis added). Even if the district court is correct that deterrence is of less value in tax protestor cases than in run-of-the-mill tax evasion cases, we remain of the opinion that the district court acted unreasonably in entirely discarding deterrence as a consideration in imposing sentence.

We also think that the sentences imposed by the district court fail to reflect the seriousness of the offense and do not provide just punishment, as required by 18 U.S.C.A. § 3553(a)(2)(A). Appellants failed to file taxes of

any sort for *twelve years* before they were apprehended. Moreover, as the Government notes, neither Appellant began paying taxes until 2004, after his conviction. Finally, we note with respect to Davis' sentence that we are troubled by the heavy reliance of the district court on Davis' charitable works. *Cf.* U.S.S.G. § 5H1.11, p.s. (providing that a defendant's charitable works are ordinarily not a basis for departing from the guidelines).

IV.

For the reasons set forth above, we affirm Appellants' convictions. We vacate their sentences and remand for resentencing consistent with this opinion.

AFFIRMED IN PART;

VACATED AND REMANDED IN PART

UNITED STATES DISTRICT COURT
For The Western District of North Carolina

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

[Entered March 14, 2006]

UNITED STATES OF AMERICA,

v.
Patrick Grant Davis

Case Number: 5:02cr26-1
USM Number: 19088-058
Defendant's Attorney Claire Rauscher

THE DEFENDANT:

__ Pleaded guilty to count(s).
__ Pleaded nolo contendere to count(s) which was accepted by the court.
X was found guilty on count(s) 1-4 after a plea of not guilty.

ACCORDINGLY, the court has adjudicated that the defendant is guilty of the following offense(s):

Title and Section	Nature of Offense	Date Offense Concluded	Counts
18: U.S.C. 371	Willful Failure to File Tax Return, Supply Information and Pay Tax	December 3, 2002	1
26: U.S.C. 7203	Willful Failure to File Tax Return, Supply Information and Pay Tax	Calendar year 1995	2

26: U.S.C. 7203	Willful Failure to File Tax Return, Supply Information and Pay Tax	Calendar year 1996	3
26: U.S.C. 7203	Willful Failure to File Tax Return, Supply Information and Pay Tax	Calendar year 1997	4

The defendant is sentenced as provided in pages 2 through 4 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984, United States v. Booker, 125 S.Ct. 738 (2005), and 18 U.S.C. § 3553(a).

__ The defendant has been found not guilty on count(s).

__ Count(s) (is) (are) dismissed on the motion of the United States.

IT IS ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay monetary penalties, the defendant shall notify the court and United States attorney of any material change in the defendant's economic status.

Date of Imposition of Sentence: 2/23/06
/s/ Graham C. Mullen
Signature of Judicial Officer

Graham C. Mullen
United States Senior Judge

Date: 14 MAR 06

Defendant: Patrick Judgment Page 2 of 4
Case Number:

PROBATION

The defendant shall be on probation for a term of FOUR (4) years.

__ The condition for mandatory drug testing is suspended based on the court's determination that the defendant poses a low risk of future substance abuse.

STANDARD CONDITIONS OF SUPERVISION.

1. The defendant shall not commit another federal, state, or local crime.
2. The defendant shall refrain from possessing a firearm, destructive device, or other dangerous weapon.
3. The defendant shall pay any financial obligation imposed by this judgment remaining unpaid as of the commencement of the sentence of probation or the term of supervised release on a schedule to be established by the court.
4. The defendant shall provide access to any personal or business financial information as requested by the probation officer.
5. The defendant shall not acquire any new lines of credit unless authorized to do so in advance by the probation officer.
6. The defendant shall not leave the Western District of North Carolina without the permission of the Court or probation officer.
7. The defendant shall report in person to the probation officer as directed by the Court or probation officer and shall submit a truthful and complete written report within the first five days of each month.

8. A defendant on supervised release shall report in person to the probation officer in the district to which he or she is released within 72 hours of release from custody of the Bureau of Prisons.
9. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.
10. The defendant shall support his or her dependents and meet other family responsibilities.
11. The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other activities authorized by the probation officer.
12. The defendant shall notify the probation officer within 72 hours of any change in residence or employment.
13. The defendant shall refrain from excessive use of alcohol and shall not unlawfully purchase, possess, use, distribute or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as duly prescribed by a licensed physician.
14. The defendant shall participate in a program of testing and treatment or both for substance abuse if directed to do so by the probation officer, until such time as the defendant is released from the program by the probation officer; provided, however, that defendant shall submit to a drug test within 15 days of release on probation or supervised release and at least two periodic drug tests thereafter for use of any controlled substance, subject to the provisions of 18:3563(a)(5) or 18:3583(d), respectively.
15. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.

16. The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.
17. The defendant shall submit his person, residence, office or vehicle to a search, from time to time, conducted by any U.S. Probation Officer and such other law enforcement personnel as the probation officer may deem advisable, without a warrant; and failure to submit to such a search may be grounds for revocation of probation or supervised release. The defendant shall warn other residents or occupants that such premises or vehicle may be subject to searches pursuant to this condition.
18. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed by the probation officer.
19. The defendant shall notify the probation officer within 72 hours of defendant's being arrested or questioned by a law enforcement officer.
20. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the Court.
21. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.
22. If the instant offense was committed on or after 4/24/96, the defendant shall notify the probation officer of any material changes in defendant's economic circumstances which may affect the defendant's ability to pay any monetary penalty.

23. If home confinement (home detention, home incarceration or curfew) is included you may be required to pay all or part of the cost of the electronic monitoring or other location verification system program based upon your ability to pay as determined by the probation officer.
24. The defendant shall cooperate in the collection of DNA as directed by the probation officer.

ADDITIONAL CONDITIONS:

25. The Defendant shall serve 12 months House Arrest with work release, and shall remain at his place of residence except for employment or other activities approved in advance by a Probation Officer.
26. Upon completion of the term of home detention, the Defendant shall perform twenty-five (25) hours of community service. Defendant must do volunteer work he is not currently participating in.
27. Defendant shall abide by the tax laws.

Defendant: Patrick
Case Number:

Judgment Page 3 of 4

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the Schedule of Payments.

ASSESSMENT	FINE	RESTITUTION
$175.00 (Paid)	$0.00	$0.00

FINE

The defendant shall pay interest on any fine or restitution of more than $2,500.00, unless the fine or restitution is pain in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on the Schedule of Payments may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

X The court has determined that the defendant does not have the ability to pay interest and it is ordered that:

X The interest requirement is waived.

— The interest requirement is modified as follows:

COURT APPOINTED COUNSEL FEES

X The defendant shall pay court appointed counsel fees.

X The defendant shall pay $ To be determined towards court appointed counsel fees.

Defendant: Patrick Judgment Page 4 of 4
Case Number:

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

A __ Lump sum payment of $__ due immediately, balance due
__ Not later than __, or
__ In accordance __ (C), __ (D) below; or
B X Payment to being immediately (may be combined with __(C), __ (D) below); or
C __ Payment in equal ____ (E.g. weekly, monthly or quarterly) installments of $ ___ To commence ___ (E.g. 30 or 60 days) after the date of this judgment.
D X Payment in equal monthly (E.g. weekly, monthly, quarterly) installments of 150.00 To commence 60 (E.g. 30 or 60 days) after release from imprisonment to a term of supervision. In the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. Probation Officer shall pursue collection of the amount due, and may request the court to establish or modify a payment schedule if appropriate 18 U.S.C. § 3572.

Special instructions regarding the payment of criminal monetary penalties:

X The defendant shall pay the cost of prosecution.
__ The defendant shall pay the following court costs:
__ The defendant shall forfeit the defendant's interest in the following property to the United States:

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments are to be made to the United States District Court Clerk, 401 West Trade Street, Room 210, Charlotte, NC 28202, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program. All criminal monetary penalty payments are to be made as directed by the court.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) community restitution, (6) fine interest, (7) penalties, and (8) costs, including cost of prosecution and court costs.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF NORTH CAROLINA
CHARLOTTE DIVISION

UNITED STATES OF AMERICA,	)
Plaintiff,	) 5:02CR26
	)February 23, 2006
vs	)
	)
PATRICK GRANT DAVIS,	)
Defendant.	)
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TRANSCRIPT OF SENTENCING
BEFORE THE HONORABLE GRAHAM C. MULLEN
UNITED STATES DISTRICT JUDGE

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(Court called to order at 10:00 and defendant present in courtroom.)

THE COURT: All right. This is the matter of the United States v. Patrick Davis.

Mr. Davis was found guilty after a trial by a jury, and we're here for a sentencing hearing.

I think probably the first thing I'd like to hear about is this motion that Mr. Brown's filed for revocation of bond, request for issuance of a warrant. There's no warrant been issued but I think I would like to hear about what happened on this before we move forward.

So if you have some witnesses on this, then we can proceed with that, and then I'll go forward with the findings on the Presentence Report as to the offense level and criminal history and move into allocutions and that sort of thing.

What have you to say, Ms. Rauscher?

MS. RAUSCHER: Your Honor, if you'd like, I mean I'll put up David Yarborough, who is the accountant, to explain what occurred with the offer and compromise. I assume you'll take the averments by the government in the motion.

THE COURT: Say that again?

MS. RAUSCHER: You don't want to hear from the agent? I essentially am in agreement that an offer and compromise was filed where Box 17G was not checked off.

THE COURT: That's what I gathered was the case; that there's no factual dispute about the fact that that box was not checked on the offer and compromise.

MS. RAUSCHER: That's correct. At this time, Your Honor, I called Mr. Yarborough to the stand.

THE COURT: All right. Mr. Yarborough, come forward and be sworn.

DAVID YARBOROUGH

being duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. RAUSCHER

Q Mr. Yarborough, would you state your name for the record, please?

A David Yarborough.

Q And would you tell the Court by whom you're employed and what you do?

A Employer is Gerald Yarborough, CPA. We are a firm here in the Charlotte area, and we help -- our focus is helping people who have gotten in trouble with the IRS, both individuals and companies; helping get those liabilities resolved.

Q And were you hired by Patrick Davis in approximately 2004 to help resolve his tax liabilities and assist him in becoming compliant with all taxes?

A We were. Early 2004.

Q Would you tell the Court briefly what all did your firm do in regards to making him compliant.

A We first began -- Mr. Davis had asked us to help him get current with his filing. So we began a process of

going back and preparing tax returns for 1994 through means of bank statements, cancelled checks, computer records; a project that took almost six to eight months to complete.

Q How difficult was that project?

A It was large. Large.

Q After you completed that project, were the filings for 1990 through I guess at that point 2004 filed with the IRS?

A They were.

Q And in addition, did you assist -- did your firm assist Mr. Davis in being compliant with all employment taxes and personal income taxes?

A That's true, yes.

Q Now, was also part of your services provided to negotiate offers and compromise regarding both the back state and federal taxes?

A Yes.

Q And would you tell the Court how that process worked and what you did.

A We began in the fall of '04 by gathering financial information to see how Mr. Davis is going to qualify for an offer.

I think we began with the state first. We had been in contact with the state revenue officer and initiated the settlement with the state in early 2004; February, I believe. And that case was resolved in the summer of '05.

At that same point we continued building on the case that we had already put together and submitted case work for the Internal Revenue Service, too.

Q I want to talk a little bit about the information that was provided for the state offer and compromise and the federal offer and compromise.

A Okay.

Q Was the documentation essentially the same for both of those offers?

A Very much. You know, we continually update financial information, so we're accurate in our income and things of that nature; make sure nothing has changed or fluctuating. But the body of the case would have, you know, unless --unless there was just something that we knew about or didn't know about, it wouldn't -- it would have been the same from when we started early in '05.

Q So when you filed -- you said it was the state offer and compromise filed approximately February of 2005?

A Right.

Q Do you have any of that documentation with you today?

A I do.

Q Could I see it for a second?

A Sure. (Hands document to counsel.)

Q And would you describe for the Court about what the forms are that are attached to that offer and compromise?

A We use the IRS form 433A. It's a standard -- we can use that form for both North Carolina Department of Revenue as well as the IRS. That, in addition to many documents supporting the assets, equity, income, expenses, accounting for dollars in, dollars out, it's a pretty elaborate package.

Q And once that package is submitted, are there any changes that go on? When you file it with the state, were there any additional changes that occurred during that negotiation process?

A Not with the state. They -- once the case was submitted, the next thing we heard from the state is that the offer was accepted. They accepted the case we had submitted. But it varies on a case-by-case basis. If additional information is needed, or updates, they'll reach out and contact us and we'll provide that information to them.

Q Now, after the offer from the state was accepted and paid in July 2005, did you then proceed to file an offer and compromise with the IRS?

A We did.

Q And what documentation did you provide to the IRS for that offer and compromise?

A We basically took the case that we had put together for the state; we updated the IRS -- the attachments need to be current, two, three months current information, so we updated some attachments; updated financial information. Basically recalculated an offer that we -- you know, based on equity and income and things of that nature, and then it was submitted to the IRS at that point.

Q And were you aware that Mr. Davis's mother died in May of 2005?

A We were -- we were aware at some point that she had died. I don't know exactly when that was, but we were aware that she had passed away.

Q And when the form was filed with the IRS in September of 2005, was there any notation on the documentation that Mr. Davis was the executor of her estate?

A There is a place on the form for that to be noted as to whether he was or was not. We changed nothing on that form at that point. We didn't realize that he was the executor of the estate.

Q And when Mr. Davis came into -- he has to sign the offer and compromise --

A Right.

Q -- correct, for the Federal IRS?

A Right.

Q Did you or anyone from your office go over each and every line with him, and specifically 17G, which was the box --

A No.

Q -- for beneficiary?

A When Mr. Davis came in, there was a good four or five places that he needs to sign out of a package that's possibly 100 pages deep. And we didn't -- you know, we didn't ask about line 17. We weren't aware to ask about line 17 and he wouldn't have the known to ask about it.

We never went to page 2, 3, or whichever it's on. He went to the sixth page to sign the Form 433A, and then signed the offer, initial paperwork and that was it.

Q Do you have a copy of that offer and compromise with you?

A I do.

MS. RAUSCHER: The government does have a copy.

If I may approach so you have an opportunity to see this one.

THE COURT: You may. (Hands document to judge.) Q After the offer and compromise was filed, did Mr. Davis come to your office in December of 2005 and discuss his mother's estate with you?

A Actually I got a phone call from Pat in December, and he said, "Listen, there's some things that's happened with my mom's death and estate, and there's some things that I need to talk to you about and ask you what to do with." Fine.

He told me that there was a some property of his mother -- from his mother, a house, and then there was some cash, and, you know, asking how that would affect his case. And, you know our message to him was that, you know, the right thing to do at this point is we have to -- you know, we'll have to amend what's been submitted and update and provide information on the new assets that now enter the picture here, and then it will affect the offer amount. It's pretty typical.

These offer cases take 12, 18 months to work through, and there are changes in people's lives. So it's

not unusual to have updates or changes in an offer situation.

So we began to gather the information that we needed from Pat in regards to the new assets, and then we were prepared, you know, early mid-January to provide that information to the IRS.

Q And you became aware in January that the government had filed a motion to revoke his bond because of the offer and compromise. Correct?

A Yeah. I actually called the offer specialist in the middle of January and she said that CI had pulled the case and I didn't know why. We didn't know why. We just --okay. But then we found out a week or two after that the motion had been filed, yeah.

Q Okay. And you said that it's not unusual to update --

A Right.

Q -- and change the information that's provided. Correct?

A Right.

Q In fact, after the -- you received a letter in January of this year saying that the offer had been denied. Correct?

A Rejected. Correct.

Q Rejected. And there's an appeal process. Isn't that correct?

A Correct.

Q And have you prepared an appeal of that decision?

A Absolutely. The offer was rejected on the basis of it's not in the government's best interest. And, you know, according to the IRS, you know, this taxpayer clearly cannot pay the tax debt. And he does fit the offer criteria. And we believe he's a good offer candidate and we're appealing.

And we're providing as part of that -- this is our first opportunity, really, we're providing the updated additional information as part of that appeal.

Q And what is the updated information that you're providing to the IRS in that appeal?

A It would be another Form 433A that includes the additional assets. Part of the -- you know, we did actually find out that a couple of life insurance policies that we didn't even realize that Mr. Davis had received were included in the first offer. They were in the first go-around. So out of the five items that he received, two were in the first offer, and the additional three have been updated on the financial forms, and then a new offer compromise, computation has been put together.

Q And was the -- did the sale of the house occur before or after the offer and compromise was submitted?

A The documentation we have is dated the middle of October, so it was after.

Q It was after.

A It was after. Yeah.

Q And all the other information is now provided in the appeal that will be filed --

A Correct.

Q -- either today or tomorrow?

A Correct. Correct.

Q And in the new 433A, does it check off that he is a beneficiary of an estate?

A It is, yes.

Q Based on your knowledge and interaction with Mr. Davis, do you believe that the check-off -- the failure to check off beneficiary was a willful act on his part?

A No. Absolutely not.

Q And why?

A Well, our firm, we prepared that document, and it's simply a case of we were not aware -- because of his mother's death, we were not aware he was an executor or anything was there coming to him as a beneficiary. We didn't update that form and we didn't know to ask Pat. And by Pat not saying -- you know, understanding the form there as well, didn't know to provide that information to us. It was just -- you know, it was something that was there that just was not known about.

Q And -- but he did provide it to you subsequent before any of this came about or came to the fore. Correct?

A Well, in December. Yeah.

Q In December. In light of all the information you have, was there any attempt by him to hide any of this money?

A No. No. As a matter of fact, none of it's been touched. I mean it's all -- the cash is still in the executor account. The life insurance policies that he received were put in his checking account which is in the original offer, and the land is still out there in the estate. I mean it's all there.

Q Okay.

MS. RAUSCHER: I have no further questions, Your Honor.

THE COURT: Cross-examine.

MR. BROWN: Thank you, Your Honor.

CROSS EXAMINATION

BY MR. BROWN

Q Mr. Yarborough, when did you tell us you were hired by Mr. Davis to prepare his returns?

A I believe it was April 2004.

Q And can you give me a little more detail as to what you did in anticipation of the filing of his returns?

A The information that was gathered was detailed: bank statements, cancelled checks, computer files, just anything and everything that we could get our hands on that would account for income during those periods.

Q And for what years did you prepare returns?

A 1990, I believe was the start, all the way up to the present.

Q And when was his 2005 tax return filed, if it has been?

A It has not been -- or has it been filed. It has been filed. Just recently within the last couple of days.

Q Did you work on that one as well?

A We did.

Q In the course of looking at the financial records to prepare his tax returns, did you look at any records associated with his wife's business?

A We did.

Q Did you look at her tax returns?

A I believe so. I don't know -- yeah, I believe we did. We handled both of those, yes.

Q In fact, throughout all the years that Mr. Davis had declined to file federal -- state and federal income tax returns, his wife had consistently filed both?

A I believe so.

Q Do you recall just on an average basis what kind of income his wife was making?

A I don't. I don't recall.

Q Would it be fair to say that it was --

MS. RAUSCHER: Objection, Your Honor. His wife was filing. She did what she was supposed to do.

THE COURT: Then it's got nothing to do with this.

MR. BROWN: Let me see.

THE COURT: What -- why are you asking about that? What do you propose to do with that, as to what we're talking about right now? I mean tell me.

MR. BROWN: Yes, sir. What I want to find out is whether this witness examined those returns from his wife, which will show and did show, that she had a -- oh, I guess a paltry sum of earnings compared to her husband. Yet the offer and compromise reflects that the vast majority of the assets were in the wife's name. My question ultimately would be how is that possible?

THE COURT: You can ask it. Q Sir?

A Our understanding is that Pat's wife has been employed in the past. She's had a career. And now the assets, as they have been presented, that's the way they were. You know, I think there were joint equity items and I think there were items that were hers and items that were his. Q Well, again, since you looked at her tax returns, wouldn't be fair to say on an annual basis her reported income was less than ten percent of what you found to be the reportable income from Mr. Davis?

A I don't know. I don't know what her income was.

Q But you looked at the return and you just don't remember.

A Well, yeah, we were much more involved in Mr. Davis's returns, so I don't know what her earning --

Q Would it be fair to say that based on the offer and compromise that you prepared for Mr. Davis, that 90 percent of the assets that the Davises owned were in his wife's name?

A We've listed it all there and broken it out, joint ownership and what she owns and what he owns. We've got it all provided here.

Q Yes, sir. My question is just a tad different. My question is: Based on the offer and compromise, isn't it accurate to say that 90 percent of the assets that are on there are in Mrs. Davis's name --

THE COURT: You're getting way outside the subject matter of what I wanted to hear testimony about. And the issue is your motion for revocation of bond --

MR. BROWN: Yes, sir.

THE COURT: -- and whether or not the evidence is adequate to convince me that this is anything other than an inadvertence on the part of Mr. Davis.

MR. BROWN: I may be taking the long way around the Robin's barn, Your Honor. But what I'm trying to establish for the Court is that this offer and compromise is choked full of falsities. And I assume Mr. Yarborough didn't prepare this thing knowing it was false.

Q Isn't that fair, sir?

A Yeah. We prepared it based on the facts.

Q My question is: You would not knowingly submit to the IRS a false document.

A Absolutely not.

Q All right. So if there's any false information on this document that came from Mr. Davis. Fair?

A If there's any false information, that's true.

Q All right. And, therefore, if the vast majority of the income earned during the relevant time period was earned by Mr. Davis, did you not think for a moment as you prepared this offer and compromise, there may be some question about the way the assets appear to be split up on the offer and compromise?

A You know, the way the form is designed and the way this case is designed is, you know, you have to account for who owns the asset.

Q Yes, sir.

A Not how they got the asset.

Q All right.

A And, you know, how it's been presented.

Now, if there were some questions and there were some concerns, it would be very appropriate for the IRS during the investigation to raise those questions and concerns, and that would be something that would be dealt with through the process of settling this case.

Now, the facts are and the assets are, the way they are presented is true in that it's a joint ownership, or she may have full ownership, or he has: not how they got it.

Q When did you become aware of Mr. Davis's mother's death?

A Honestly, I don't know. I don't know that answer.

Q Can you give us a time of year?

A It was '05. I mean, it had to have been -- I think my assistant probably knew before I did. She was very much involved with the bookkeeping and working with Pat's company. And I -- you know, I'm sure that we were made aware soon after she had found out that there was a death there, and, you know, it had to have probably been somewhere in June or July.

Q Okay.

MR. BROWN: May I approach the witness, Your Honor?

THE COURT: You may.

BY MR. BROWN

Q Mr. Yarborough, I want to show you the offer and compromise that was submitted to the state real quick. And if you look on there he's a life insurance policy in the name of Mr. Davis. Isn't that right?

A Correct.

Q About $80,000 worth of cash value, according to the document?

A Right.

Q Where did that disappear to between the time you filed that one and the time you filed the one with the IRS?

A I think Mr. Davis withdrew that policy. He needed that money to live on.

You'll find that money accounted for in account of the IRS offer. There are some amounts in there that would be attributed to what he -- you know, his business

is far down during this time period and he's scrambling to make ends meet. He had -- we knew he had withdrawn that life insurance policy to live on that money.

MR. BROWN: May I approach again?

THE COURT: Sure.

Q I want to show you the offer and compromise that was submitted to the Internal Revenue Service. Can you tell me on that document where I'm going to find the $80,000?

A This is the 433A. Look at the offer and compromise computation.

Q Okay. 433B?

A No. It would be an Xcel spreadsheet, the offer and compromise computation. It's in your -- it would be in your copy.

MS. RAUSCHER: The judge, I think, has that.

Q All right. But it's not -- you're saying that it's on a computation attached to the 433A.

A It's in the checking accounts.

Q All right. And you were aware that that money was withdrawn, the life policy was cashed in and the money was placed there?

A He had told us he needed that money to live on. Yes, we were of what he did there and we accounted for that. Yes.

Q All right. By the way, you said you learned about -- you learned about the death of the defendant's mother in

June or July. Did you make any effort when you learned about that to find out whether he was the beneficiary of his mother's estate?

A Did not -- did not tie -- you know, when we heard of his mother's death, it was more of a, "Oh, hate to hear that." Did not ask whether there was any assets or whether he was -- anything to do with her estate. Typically don't ask that question.

We're -- you know, if we were starting this process in May -- I'm sorry -- June or July, after his mother's death, if we had started this new, that would have been a question that Mr. Davis would have answered in our questionnaire. It's just that the bulk of this information was put together prior to her death.

Q I understand that. But how many offers and compromises does your firm help taxpayers prepare on an annual basis?

A Maybe 20, 25, 30 a year.

Q Don't you routinely ask your clients whether they are the beneficiaries of an estate?

A Absolutely. And so was Mr. Davis.

Q And so it would not be a surprise to you if you learned that the defendant's mother died, that he might be the beneficiary of an estate, would it?

A Not necessarily. I mean, you know, there's another case we have right now, the gentleman's father died, and he isn't -- there is no beneficiary and he's no executor. There's nothing there. So it would not be out of the ordinary when you hear of a death for that to trigger these chain of events that, "Are you a executor or beneficiary?"

Q Yet you routinely ask that of every one of your clients. Correct?

A No, we don't.

Q You don't ask every client whether they are a beneficiary of an estate?

A If we are gathering financial information on a client in order to fill out a form 433A, then that question would be posed as part of the questionnaire to fill out that form.

Q Yes, sir. And so you routinely ask that question.

A For those who it would apply to, yes.

Q And as a tax -- experienced tax preparer, you're telling this Court today, under oath, that when you learned of the death of the defendant's mother, a little flag doesn't go off in your head to say, "Geez, I ought to at least ask, inquire, since we didn't ask that question earlier."

A The two -- no, it wasn't put together.

Q So it wouldn't have the dawned you to amend the state offer and compromise before it was accepted?

A The -- you know, state offer submitted back in the end of February, early March -- you know, the very next notification we got from the state is it was accepted. If they would have contacted us back and said, "Hey, we want to ask some questions about these items, or, you know, provided us some updated information," we would have absolutely done ate of it at that point and it's very normal to do that. Mr. Davis is not the only case. Many

North Carolina cases come back with just an acceptance letter.

Q Which way do you want to have it, Mr. Yarborough?

A In regards to?

Q You just told Judge Mullen that it's no big deal that you submitted an offer and compromise to the Internal Revenue Service which did not reflect the fact that the defendant is a beneficiary of an estate because you can always amend that offer and compromise, yet now you seem to be telling Judge Mullen, well, it's really up to the state and apparently to the IRS to inquire about.

THE COURT: That's an unfair characterization --

THE WITNESS: Yeah, that's not true.

THE COURT: -- of his testimony. He doesn't have to answer that.

MR. BROWN: Let me ask a different question.

THE COURT: You can make an argument if you want to.

I think we're done with this. You can ask -- you both can give me a five-minute summation, if you wish. I'm prepared to make findings of fact and rule on the matter.

MR. BROWN: With the Court's permission, I have one more question.

THE COURT: And that is?

BY MR. BROWN

Q You said, Mr. Yarborough, as I understood your testimony, that the house did not sell until October. Correct?

A Well, the documentation we have of the proceeds that Mr. Davis received from the house was in October.

Q Did Mr. Davis bother to tell you that the house had been pending sale for at least a month before it actually sold?

A The first time we found out about the house at all was in December when we -- when he brought it to our attention. And I think it was sold -- the estate was handling that or what have you -- so just the information that was provided to us showed funds from that sale that Mr. Davis received was in October.

MR. BROWN: No further questions. Thank you, Judge.

THE COURT: All right. I'm prepared to proceed on this unless the government has any evidence it wants to put up.

MR. BROWN: I have no other evidence, Your Honor.

MS. RAUSCHER: You can step down, Mr. Yarborough. Thank you.

THE COURT: Then I'm prepared to make these findings of fact.

First, that the state offer and compromise was submitted prior to the death of Mr. Davis's mother. That the information concerning whether or not he was a

beneficiary of an estate was accurate when submitted to the state of North Carolina. That the CPA, for whatever reason, did not follow-up at the time the offer and compromise was submitted to the Internal Revenue Service but simply used the same information.

That the failure to check Block 17G was inadvertent and not willful, and that the matter is, for purposes of this, inadvertent, and I deny the government's motion for a bond revocation. And I think we're ready to proceed with the sentencing matter. Now, whether you wish to indict him on that or not, I don't know. That's up to you all. But I certainly think that on this evidence that my findings of fact are correct.

I base that also significantly in part on a credibility determination from having heard the testimony of r. Yarborough, and the failure of any additional evidence on the part of the government.

Now, we're ready to proceed. Do you want to be heard on your objections?

MS. RAUSCHER: Your Honor, the only significant objection is that I believe that the finally total offense level is a 16. We had made some objections and Your Honor ruled in Mr. Baucom's case that the state taxes should not be included, and I know Ms. Easley has a factor as to what that is; it's around 325,000, which does not change the Guideline advisory range. So it is a 16/I.

So I don't really have any other objections other than those, Your Honor, if Your Honor accepts the correction.

THE COURT: Then I'll hear the government's objection on the acceptance.

MR. BROWN: Thank you, Your Honor.

Actually we have two objections. But the objection on the acceptance of responsibility is that the defendant did not, as the Guidelines anticipate, for the rare case in which a testimony defendant who proceeds to trial should get acceptance, the defendant did not make a viable -- let alone legitimate, let alone a viable constitutional challenge is the Guideline Commission anticipated. Rather, his challenge to the income tax laws of the United States as spurious and frivolous and oft rejected by numerous courts of appeals. Therefore, it does not fall -- as the Ninth Circuit -- even the Ninth Circuit filing -- does not warrant the acceptance of responsibility when an illegal tax protester forces the government to trial on criminal tax charges predicated on the frivolous belief that the tax laws are inapplicable. And, therefore, we submit that the acceptance of responsibility reduction is not warranted here.

THE COURT: All right. And your other objection?

MR. BROWN: Your Honor, it just came to my attention that the amount of tax loss in the Presentence Report is incorrectly low, through no fault of Ms. Easley I'm confident.

But Mr. Davis, as Mr. Yarborough told us, filed tax returns sometime after his conviction. And according to the tax returns filed by Mr. Davis, his actual federal income tax liability, without any inclusion of state taxes or federal penalties and interest, exceeds $426,000. And according to the Guidelines -- and in particular I'll direct the Court's attention to 2T -- Guideline 2T1.1, in the Application Notes it provides that if the offense involved the failure to pay tax, the tax loss is the amount of tax that the taxpayer owed and did not pay.

As the rules say, I'm required to make a reasonable estimate of loss amounts. I think that what was done in the Presentence Report is that reasonable estimate. We don't know whether this is an accurate amount or not; don't know whether the amounts are going to be accepted by the IRS as the loss -- as to the tax amounts. I have no idea what's going to happen with that.

So 16 and one it is. And you're not responsible for the fact that the agency that you're representing did not bring to your attention this information in a timely manner but they didn't, so we're all stuck with it.

16 and one. The Guidelines are advisory, and I have to look at the Guidelines in that regard, as advisory Guidelines establishes a sentencing range of 21 months incarceration on these counts.

And I'll now hear from everybody in allocution and argument on the appropriate sentence.

MS. RAUSCHER: Your Honor, you obviously presided over the trial and I did not get involved until after verdict. But you certainly know that Mr. Davis, along with his codefendant, Mr. Baucom, were what are kindly or normally referred to as tax protestors. They were individuals who refuse to accept that they had an obligation to file taxes.

Well, obviously as Your Honor can see, since the time of the conviction, Mr. Davis has certainly changed his opinion and his reaction to what his obligations are in paying taxes.

I think the Court can note based on your experience on the bench that this was an extraordinary undertaking taken on by Mr. Davis.

He essentially went back, at his own expense, hired a firm to not only make sure that his business was compliant, that all state and local and federal taxes -- the amount of money he paid for years 2003, 2004 -- 2003 and -4 to make sure all of his employees' back taxes paid -- and then 2004, 2005 was extraordinary in and of itself. But he also hired a firm to go back and reconstruct his taxes back to 1990. You know, if you really think about how difficult that is, it is an difficult undertaking.

And in doing so, the accountants came up with figures that differ from the IRS's. In this case they actually show more tax liability.

But he filed all of those. He just filed his 2005 tax returns. He showed me the receipts showing that he paid for all the employment taxes and everything for his business to the North Carolina Department of Revenue. He has settled with the State of North Carolina. So all of this tax liability for the State of North Carolina are done and he wants to resolve them as well with the IRS.

As Your Honor now knows, he does have some additional funds to put toward resolving the IRS case and he wishes to do that. And I'm hopeful when the appeal is filed, it will open up this negotiation, that they can resolve it, and that the IRS can get back the money, a good portion of the money.

Mr. Davis is unusual. He's seen the light. He also told me that if the IRS has other individuals in his position who are tax protestors, he would be very happy to speak to them about -- as what he said -- what their future is and why he has changed his ideas of why folks should be paying their taxes.

Besides all of this, Your Honor needs to know a little bit about Mr. Davis. His wife is here. He has a son. He bought out his partner in the surveying business, so

he is now the sole owner and it's incorporated, and the business is finally building back. The amount bad publicity from the conviction, he lost a lot of business. But it's slowly coming back and he wants to make a go of that.

Also, he and his wife are part of the founding group that started Lake Norman's Children's Relief Fund, and I think everybody usually in the summer every year hears about the Belarussian children who are brought over from the Chernobyl area who are brought in for medical care, and Mr. Davis has been in the forefront of that program. His wife is the administrator and they have taken in children. They do all they can to help these children every year and I have submitted documentation about that.

He is a member, a strong member of the community and his church. He's done everything he can, Your Honor, to make this bad situation right.

Your Honor obviously knows that the Guidelines are advisory, and you have to look at the 3553(a) factors. And in my first letter to the Court in February 3rd, 2005, I broke out what I believe is the appropriate action in this case, going through all the five factors.

But, you know, the first one as you look at the actual offense, a failure to file tax returns is not a violent offense that warrants significant incarceration. This is an offense -- they made their point with Mr. Davis, Your Honor, that this is somebody who is -- he went the other way. He's true believer. He'll file his taxes and he does it all and he's actually a poster child now for the IRS.

The history and characteristics of the defendant certainly support a noncustodial sentence. No prior record. He's a good father and family man. He's gainfully employed. He employees others. He has a long record of community service, and, of course, his compliance.

You talk about the seriousness of the offense, I'd submit to the Court that a nonincarcerative sentence in this case would certainly not belie the seriousness of the offense. Certainly in this case he's done everything that he should do and demonstrated rehabilitation.

I think this is one of the cases, Your Honor, you can point to to say there is demonstrated rehabilitation regarding the specifics of the offense conduct: Being compliant with the tax laws, making payments on back taxes, settling with the state of North Carolina. And his wish to settle with the IRS and repay what he's owed certainly shows his rehabilitation.

I'd ask the Court to consider a nonincarcerative sentence. He needs to continue his business to support his family and continue to make payments. He's willing to turn over all of his estate money, all of the money he gets from the estate of his mother.

And the final thing I want to say about this case, Your Honor, is that when his mother died suddenly in May of last year she was undergoing a rudimentary procedure and the surgeon made a gross error and cut an artery. If he makes a determination to file a lawsuit against the doctor, which his brother wants to do on the basis of the estate, there may be some additional funds. It is clear negligence in this case what happened to his mother. In fact, I have the death certificate here and it says "Perforated coronary artery." He and I have discussed that and that's something he can do.

His mother was the bookkeeper of his business, a friend, and also the caretaker for his children. Her death was a huge, huge surprise and very difficult. But through all this, he has continued to do what he should do to make this right and I'd ask the Court to consider a noncustodial sentence.

THE COURT: All right. Mr. Brown, what do you say?

MR. BROWN: Your Honor, under the factors identified in 3553(e) -- 3553(a), a sentence of nonincarceration is simply implausible.

If the Court examines those factors carefully, this defendant is poster child for an active term of imprisonment.

He had a 12-year history of not filing tax returns. And when we talk about the nature of the offense, this is not your typical tax evader. This guy didn't pay for 12 years. He had over -- by his own tax return filings, he had over $1.2 million in adjusted gross income -- I don't even know what the gross income figure is. Most taxpayers never achieve that kind of money in their lifetime.

If you lock at his income tax years earnings for each year -- I mean, his tax liabilities for each year, they equate to the average amount of income most blue collar workers make in a year. He owes, by his own admission, more than $426,000; by the IRS's calculation, the interest and penalties takes it well over a million dollars.

The average American citizen never has that kind of liability and they won't understand how a guy that can cheat the United States, how he deprives them of their portion of his tax payments, should get a probationary sentence for a 12-year criminal history.

Most important, though, Judge, I would ask you to take a look at 3553 (a) (6), the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.

THE COURT: What is the evidence of that in this proceeding today?

MR. BROWN: Sir?

THE COURT: I say what's the evidence for the Court to consider in reference to that factor?

MR. BROWN: I don't have any evidence to offer you, Judge, but you have tried cases --

THE COURT: I'm supposed to consider evidence in these things, aren't I?

MR. BROWN: Yes, sir. But you don't have to have any evidence in this instance because you, sir, have tried enough cases in district alone to know that this amount of tax loss during the mandatory term of the Guidelines would have warranted at least 21 to 27 months in jail.

THE COURT: I've tried one other case like this.

MR. BROWN: I would submit to Your Honor you can take judicial notice of the fact that no defendant at any time before the Guidelines became mandatory or after the Guidelines became mandatory, who evaded a million -- who failed to report a million dollars of income received a probationary sentence.

If the Court -- if the Court needs specific evidence, I can provide you case after case after case.

THE COURT: Look. We're here today. Everybody's had plenty of time. I mean, there's no evidence for me.

MR. BROWN: There is evidence, Your Honor. I would ask the Court to take judicial notice of every

I have considered these, and I have considered the nature and circumstances of the offense. This man took many, many years -- and I don't know how they bought into this but he didn't file his tax returns.

This is a serious matter, but I'm compelled to impose a sentence sufficient, but not greater than necessary, to comply with the purposes in paragraph 2 of Subsection 3553 (a). So in considering the nature and circumstances of the offense, I also have to consider the history and characteristics of the defendant.

The defendant is a man who has provided extraordinary charitable works. Again, that's not something I would consider under the Guidelines, but as the Court has said in *Booker* and *Fanfan,* that I have to consider all of this stuff.

So he has no criminal history. He has a history of service to the community. And balancing all of that, and considering that under 3553 (a) (1), the good works that he's done does not outweigh the fact that he has committed an offense.

As to the nature of the need for the sentence to reflect the seriousness of the offense, to promote respect for the law, and provide just punishment for the offense, the government persuasively argues that a sentence of incarceration is necessary in order to do that. The defense equally persuasively argues that it is not.

As to adequate deterrence to criminal conduct, either people are already afraid of the Internal Revenue Service or nothing I do in this case is going to deter other people. I think Mr. Davis is adequately deterred from any kind of criminal conduct. There's no need to protect the public from further crimes of this defendant. He's not likely to do that. In fact, he presents to the Court a rather extraordinary record of attempting to get his taxes right.

And the other matters that I've dealt with personally, there was never any real effort to get back with the taxes.

So he has not got a violent offense. He's -- as I said, no criminal record. He's a good husband and father. Gainfully employed. He employs others. If I incarcerated him, the others are going to lose their jobs. If I incarcerated him so that his business tanks, the Internal Revenue Service seems unlikely to get much of the monies that are owed. And he has -- in terms of the kind of sentences available, they range from a outright probationary sentence to a sentence of incarceration. And there is no evidence on Factor 6 of unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct. Certainly many, many people who are tax protestors wind up with sentences of incarceration.

In Factor 7, the need to provide restitution to any victims, I will consider that as the need to provide appropriate efforts to repay the government the taxes that he's owed.

In considering all of these factors, then I have the following proposed sentence: I propose a sentence of four years of probation on the following conditions:

Number one, upon total conclusion of this case, he is to serve 12 months of house arrest with work release and he is to remain compliant with the tax laws.

He is to serve his house arrest when designated by the probation officer. I don't want him designated until all appeals are over with because I don't want him to go do house arrest for the 12 months, and then if the Fourth Circuit disagrees with what I'm doing, have to redo it all over again. So I don't want him doing that until such time as the case is dealt with if the government determines to appeal.

I also would order him to do -- over that four years, I want him to do 20 hours of community service each year. You may negotiate the community service. The community service may not include what you're doing with the Belarussian orphans. I commend to you work on the Blue Ridge Parkway, Pisgah National Forest, and other trails which people have found to be an appropriate way to do community service and help out a lot of other folks.

Now, I decline to order a fine. You don't have any ability to pay a fine. I decline to order further amounts to the Internal Revenue Service. They seem to be able to collect whatever they need to collect by their civil efforts.

He has a special assessment of $175 which is due and payable immediately.

MS. RAUSCHER: That's already been paid, Your Honor.

THE COURT: Already been paid. All right.

In addition, you are to pay the cost of prosecution as determined by the United States Attorney, and you can negotiate that with the United States Attorney's Office.

I find that you can pay at least $150 a month towards that, that cost of prosecution.

And I think that's all I need to do today. Are there any -- Ms. Easley, anything else I need to do?

PROBATION OFFICER: No, sir.

THE COURT: There are no other counts. They've all been dealt with in this matter. All right.

You have to right to appeal, Mr. Davis. The government has the right to appeal, also. You can appeal the trial and the sentence. If you are indigent, you can have a attorney appointed to represent you. Ms. Rauscher, if your client directs you to file a Notice of Appeal, you are to do so. It has to be in writing. It must be within a reasonable period of time.

I do not know the impact should the government appeal, because the government has a lengthy period of time within which to appeal, 60 days or more as I recall, and I don't know whether that impacts your appeal or not. But in view of the facts of the case, you may wish to consider an appeal, or at least a cross-appeal, since the Court forced you to go to trial pro se over your objection.

All right. That's it folks. We're in recess until 2 o'clock.

MR. BROWN: Thank you, Your Honor.

THE COURT: Thank you.

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~~No. 07-206~~

In the Supreme Court of the United States

PATRICK GRANT DAVIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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In the Supreme Court of the United States

No. 07-206

PATRICK GRANT DAVIS, PETITIONER

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

Petitioner contends (Pet. 10-17) that the court of appeals failed to defer to a district court's application of the sentencing factors set forth in 18 U.S.C. 3553(a) (2000 & Supp. IV 2004) in accordance with *United States* v. *Booker*, 543 U.S. 220 (2005), and thereby negated the advisory character of the Guidelines. He argues (Pet. 17) that the Court should hold the petition in this case pending its decision in *Gall v. United States*, No. 06-7949 (to be argued Oct. 2, 2007), in which this Court granted certiorari to address the question whether, when determining the "reasonableness" of a district court decision under *Booker*, the strength of the reasons for a variance from the United States Sentencing Guidelines should vary proportionally to the degree of the variance.

While this Court could choose to hold the petition in this case for *Gall*, the two cases are in different proce-

dural postures, and it appears to be unnecessary to hold the petition in order to allow petitioner to obtain the benefit of any favorable aspects of a decision in *Gall*. The court of appeals in this case reversed petitioner's downward variance to probation, both because the district court incorrectly calculated the Guidelines range,[1] and because the court of appeals found the sentence to be substantively unreasonable.[2] Pet. App. A17. Because

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[1] Petitioner was found guilty of conspiring to defraud the United States, in violation of 18 U.S.C. 371, and of willfully failing to file income tax returns, in violation of 26 U.S.C. 7203. Pet. App. A3. Petitioner's presentence report (PSR) estimated his unpaid taxes to be $347,134. *id.* at A11-A12. Under Sentencing Guidelines § 2T4.1(G) (2003), that amount of tax loss generated a Sentencing Guidelines offense level of 18, and the PSR recommended a two-level reduction under Guidelines § 3E1.1(a) for petitioner's alleged acceptance of responsibility. See *ibid.* The district court agreed. The court of appeals held that the district court erred by refusing to count amounts of unpaid state taxes in determining the advisory guidelines range, Pet. App. A13-A14, and erroneously granted petitioner acceptance of responsibility credit, *id.* at A14-A15.

[2] The district court justified its probation sentence (from a range of 21-27 months of imprisonment) because of petitioner's charitable works, his efforts to pay his tax debt, and the court's determination that imposing a jail sentence on petitioner would adversely affect petitioner's employees; the court also held that a sentence of confinement was not needed to deter future criminal conduct or protect the public. Pet. App. A59, A62-A63. After holding that the district court erroneously calculated the guidelines range, the court of appeals offered "brief comments" on the issue of reasonableness "as an aid to the district court on remand." *Id.* at A16. First, the court of appeals indicated that the district court "acted unreasonably in entirely discarding deterrence as a consideration in imposing sentence." *Ibid.* Second, the court of appeals believed that the probation sentence failed to reflect the seriousness of the offense or to provide just punishment. *Ibid.* Third, the court was "troubled by the heavy reliance of the district court on

the case has been remanded for resentencing, the petition is interlocutory. This Court customarily declines review of cases in that posture. See *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) (interlocutory status of the case "of itself alone furnishe[s] sufficient ground for the denial" of the petition); Robert L. Stern et al., *Supreme Court Practice*, § 4.18, at 258 n.9 (8th ed. 2002). In addition, any implications of this Court's decision in *Gall* can be addressed by the district court in the first instance, or, if petitioner or the government challenges the new sentence, on a direct appeal from the resentencing. Accordingly, denial of the instant petition would not prejudice petitioner.

Nevertheless, because the course of resentencing proceedings could be affected by this Court's decision in *Gall*, the Court may wish to hold the petition pending the decision in that case, and then dispose of the petition as appropriate in light of that decision.[3]

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

SEPTEMBER 2007

[petitioner's] charitable works." *Id.* at A17 (citing Guidelines § 5H1.11, p.s.).

[3] The government waives any further response to the petition unless this Court requests otherwise.